In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 680

ARMAND VALDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19-23; R. 68-72) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 13, 1956 (R. 73). The petition for a writ of certiorari was filed on February 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction on the charge of receiving, concealing, selling, and facilitating the transportation, concealment, and sale of narcotics.

2. Whether the evidence supports the verdict that petitioner was not entrapped.

3. Whether refusal of the court to grant a subpoena under Rule 17(b), F. R. Crim. P., for the production of an imprisoned witness constituted an abuse of discretion, where his testimony would not have added materially to the evidence in the case.

STATUTES AND RULE INVOLVED

The statutes provide in pertinent part:

21 U.S.C. 173:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin.
> * * *

21 U.S.C. 174:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Rule 17(b), F. R. Crim. P., provides in part:

> *Indigent Defendants.* The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall

be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of New York of receiving, concealing and selling narcotics on April 9, 1952 (R. 4-5). The government filed a second offender information which charged petitioner with a federal narcotics violation in 1946 (R. 2) and he was sentenced to a term of imprisonment for eight years and to a remitted fine of $1 (R. 5). On appeal, the judgment of conviction was affirmed (R. 73).

The evidence adduced at the trial may be summarized as follows:

On April 9, 1952, in the city of New York, pursuant to an arranged appointment, a federal

narcotics agent (Miss Mabel Thomas) together with special government employee Bill (William Jernigan (R. 32)) met petitioner, from whom Bill had previously purchased narcotics, for the purpose of buying narcotics from him (R. 18-19, 25). The three got into a taxi where Miss Thomas advised petitioner that she wished to buy a quarter of an ounce of heroin and asked the price. Petitioner said that the heroin would cost about fifty dollars and said he wanted the money before he could go any further. Miss Thomas gave him fifty dollars at that time (R. 19-21). At Lexington Avenue and 116th Street, the three left the taxi (R. 21). Petitioner advised Miss Thomas and Bill to wait for him at Park Avenue and 116th Street, and then left. Within a few minutes petitioner rejoined them and the three went by taxi to petitioner's apartment (R. 21-22). There petitioner said that it was necessary for him to divide the purchase since he had purchased more than Miss Thomas requested. He divided the contents of a package into two parts and gave one part to Miss Thomas. Miss Thomas took her part, rejoined surveilling narcotics agents, and gave them the package (R. 22-24). Upon analysis the package was found to contain heroin (R. 31).

Petitioner testified that Bill came to his apartment on April 9, 1952, and introduced Miss Thomas as his girl friend. Miss Thomas sat in the living room while petitioner and Bill went into the bedroom where Bill suggested that they obtain some drugs since he had some money. They took a cab

but nothing was said in the cab about the drug. At 116th and Lexington, they left the cab and petitioner and Bill crossed the street where a peddler approached them and sold the drugs to Bill. Returning to petitioner's apartment, Bill divided the drug in the bedroom with petitioner. Nothing was said or done in Miss Thomas' presence to advise her of the drug purchase (R. 32-35). Subsequently, petitioner testified that when Bill and his girl friend came to visit him on April 9, nothing was said about any drug purchase, that petitioner just went out with them and gave Bill $6 when he asked for money. During the outdoor excursion, Bill went into a drugstore alone for "cigarettes", and when the three returned to petitioner's apartment Bill left him "some" in a package "for a few sniffs", but it did not taste like heroin (R. 46-49).

Evidence was introduced to show that the Bureau of Narcotics received information to the effect that petitioner had been dealing in narcotics for several years, that he secured narcotics from an "Italian" at 117th and Lexington, and distributed them through a girl at the Lennox Lounge Bar (Def. Ex. J.; R. 63-67). Petitioner testified that he was a drug addict (R. 35) and that he had previously been convicted for unlawful possession of a pistol, unlawful purchase of cocaine, unlawful possession of heroin, and unlawful transportation of a woman (R. 36-38).

In his final instructions to the jury, the court gave a full charge on entrapment (R. 12-13). Dur-

ing deliberation the jury requested clarification of "the law and definition of entrapment." The judge further advised the jury (R. 57-59):

> Entrapment has been offered as a defense in this case. Entrapment exists only when the Government agents induce and originate the criminal intent of the defendant. There is none where the criminal intent is already present, and the agents merely afford the opportunity for the commission of a crime. That is the definition of entrapment.
>
> Now, as I pointed out in my charge, the United States Supreme Court, which has passed upon this subject, has said:
>
> > It is well settled that the fact that officers or employees of the Government merely afford the opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises.
>
> Therefore, if agents of the Government ask somebody to sell them narcotics, that alone is not entrapment. Entrapment would exist when the agents of the Government implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.
>
> Now that is two types of things, and as the courts have said, in determining whether

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Rule:

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this is entrapment or not, you may consider any evidence, such as evidence of past similar offenses of the defendant, or his ready complacence, or proof of his knowledge of and connection with the purchase, possession or sale of narcotics.

In other words, to put it colloquially, if the Government went out to someone they had no knowledge had anything to do with the possession, sale or transportation of narcotics, and persuaded him and induced him to make a sale, that might be entrapment.

On the other hand, if the evidence is such that you reasonably can conclude that the Government had reason to believe that this man was engaged in the narcotic traffic, and the Government agents went to him directly, or to somebody else, and said, "Here is somebody who wants to buy some narcotics", there they were furnishing the opportunity for him to commit a crime, but that is not entrapment.

Now that is the distinction between entrapment as a defense and entrapment which would not be any defense.

As the jury well knows, in many criminal cases it is necessary for the Government to employ artifice and stratagem, as the Supreme Court said, in order to discover whether people are committing a crime or not The employment of an artifice or a stratagem is not entrapment. In this case if you believe that the officers or employees of the Government

merely afforded an opportunity or facility for the commission of the offense, the defense of entrapment is not a good one.

However, if in this case the Government agents induced an otherwise innocent man to commit an offense, then the defense would be a good one, and this is an issue which you will have to take into consideration in reaching your verdict.

ARGUMENT

1. Seeking further review of the concurrent findings of both courts below, petitioner attacks (Pet. 8-15) the sufficiency of the evidence to support the verdict. He argues that the evidence showed that he was merely a "procuring agent" within the decisions in *United States* v. *Sawyer,* 210 F. 2d 169 (C.A. 3), and *Adams* v. *United States,* 220 F. 2d 297 (C.A. 5) (see also *United States* v. *Moses,* 220 F. 2d 166 (C.A. 3)), and not a seller as allegedly charged in the indictment.

As the court below ruled (Pet. 23), those cases, whatever their validity, have no application to the facts here involved. There, a special government employee used the defendant—moved by pity or sympathy for a purported fellow-addict—to buy narcotics from another at no profit to the defendant and without collaboration with the true seller. In this case, Miss Thomas testified that she simply "asked to buy a quarter of an ounce of heroin" and that petitioner fixed the price (R. 21). The fact that he had his own source of supply and that he obtained more narcotics than he turned

over to Miss Thomas does not alter the fact that petitioner's relationship to Miss Thomas was that of a seller. Moreover, the "procuring agent" theory applies, if at all, only where, as in *Sawyer* and *Adams, supra,* the defendants are charged solely with "selling" narcotics. Here, the indictment charged petitioner with receiving, concealing, selling and facilitating the transportation, concealment and sale of narcotics. Any one of these acts is a violation under Section 174 of Title 21 (*supra,* p. 3) for which the jury could have found petitioner guilty. *Martinez* v. *United States,* 220 F. 2d 740 (C.A. 1); *Parmagini* v. *United States,* 42 F. 2d 721 (C.A. 9), certiorari *denied,* 283 U.S. 818.

2. There is likewise no merit in petitioner's contention (Pet. 12-15) that the evidence establishes, as a matter of law, that he was entrapped. The government showed that it had reason to suspect that petitioner was a seller of narcotics, and Miss Thomas' testimony that her request to purchase was met with immediate acquiescence shows that there was no inciting to crime by the government. As shown in our Statement, *supra,* pp. 6-9, the issue was properly submitted to the jury on a thorough, correct charge, in accordance with the rule of *Sorrells* v. *United States,* 287 U.S. 435.

3. During the presentation of the government's case, petitioner's counsel for the first time[1] re-

[1] Government counsel had advised defense counsel eight months prior to trial that he did not believe he would use Bill as a witness and that Bill was incarcerated in a federal penitentiary at Milan, Michigan (R. 53-55).

quested the production at government expense under Rule 17(b), F. R. Crim. P., of William Jernigan (Bill), who was incarcerated at the federal penitentiary at Milan, Michigan (R. 26). The court denied the request on the ground "that the evidence that Jernigan can add on this will be so immaterial, that no matter who pays for it, there should be no occasion for delaying the trial" (R. 43-44). It felt that the only issue involved in the case, since petitioner's possession was undisputed, was his explanation thereof to which Jernigan could add little (R. 39-40, 44). The court did not deem it necessary to go into the question of whether petitioner was indigent, but indicated that there was sufficient evidence that petitioner was not indigent (R. 45).

Petitioner contends (Pet. 15-17) that the denial of his request was error in that "every defendant has an absolute right to compulsory process and that said compulsory process should be issued at the expense of the Government if an affidavit of indigency is submitted by the defendant." Rule 17(b) does not so provide. It authorizes the summoning of witnesses at government expense on an affidavit showing that "the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness", as well as averments of indigency.

The right to summon witnesses at the government's expense is discretionary with the trial court. Petitioner has not shown any abuse of discretion here, particularly since he waited until the trial

had started to make his request. *Goldsby* v. *United States,* 160 U.S. 70; *Gibson* v. *United States,* 53 F. 2d 721 (C.A. 8), certiorari denied, 285 U.S. 557; *Austin* v. *United States,* 19 F. 2d 127 (C.A. 9), certiorari denied, 275 U.S. 523.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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